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IN THE SUPREME COURT OF FLORIDA

ADVISORY OPINION
TO THE GOVERNOR

Case No.: SC22-139

RE: WHETHER ARTICLE III, SECTION 20(A) OF THE FLORIDA CONSTITUTION REQUIRES THE RETENTION OF A DISTRICT IN NORTHERN FLORIDA, ETC.

BRIEF OF ALL ON THE LINE FLORIDA

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STATEMENT OF THE CASE AND FACTS

All On The Line Florida respectfully submits this brief addressing the propriety of the Governor's February 1, 2022 request for an advisory opinion. The request is improper under this Court's long-standing precedent and the plain text of Art. IV, § 1(c) of the Florida Constitution, which authorizes advisory opinions only "as to the interpretation of any portion of this constitution upon any question affecting the governor's executive powers and duties." But the advisory opinion that the Governor seeks, specifically his request that this Court opine on the scope of Article III, Section 20(a)—also known as the non-retrogression standard—and whether it requires the retention of Congressional District 5 in any new congressional map, does not affect his executive power or duties. The Governor has no role in drawing Florida's congressional districts. Instead, he relies on the fact that he has the power to veto a map drawn and passed by the Legislature. But this Court long ago rejected the contention that the Governor's veto power is sufficient to sustain a request for an advisory opinion on the constitutionality of pending legislation. *See In re Exec. Commc'n*, 6 So. 925 (Fla. 1887).

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Even if that were not the case, this Court has already answered

the Governor's questions about the scope of the non-diminishment standard in previous cases in which it had time to carefully consider the question on an extensive record with substantial briefing by multiple interested parties. There is no justification for the Court to revisit those controlling decisions in a non-precedential advisory opinion.

As this Court well knows, District 5 was "the focal point" of legal challenges to the congressional map enacted in 2012 following the decennial census. *League of Women Voters of Fla. v. Detzner (Apportionment VIII)*, 179 So. 3d 258, 271 (Fla. 2015). The 2012 plan was challenged under the FairDistricts Amendments which, among other things, prohibit drawing districts that intentionally favor a political party, or that have the intent or effect of diminishing the ability of racial minorities to elect candidates of their choice. *See League of Women Voters of Fla. v. Fla. House of Reps. (Apportionment IV)*, 132 So. 3d 135 (Fla. 2013); Art. III, § 20(a), Fla. Const.

In the 2012 plan, District 5 was "visually not compact" and "bizarrely shaped," contravening "traditional political boundaries as it [wound] from Jacksonville to Orlando, narrowing at one point to the width of a highway." *League of Women Voters of Fla. v. Detzner*,

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(*Apportionment VII),* 172 So. 3d 363, 402 (Fla. 2015). The Legislature argued its north-to-south configuration, shown below as reproduced in *Apportionment VIII*, was "necessary to avoid diminishing the ability of black voters to elect a candidate of their choice." *Id.* at 402.

Apportionment VIII, 179 So. 3d at 271-72.

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This Court held that the north-to-south configuration of District 5 was unconstitutional. *See Apportionment VII*, 172 So. 3d at 402-03. The Court ordered the Legislature to redraw District 5 "in an East-West manner," rejecting claims that the east-to-west configuration made the map less compact (it did not) and explaining that such a configuration was, based on the factual record that included testimony from legislative staff, "the only alternative option" to comply with the Constitution's non-retrogression standard. *Id.* at 403-04.

After *Apportionment VII*, the Legislature drew an east-to-west version of District 5 from Jacksonville to Leon Counties, as shown

below, and this Court approved that configuration:

Apportionment VIII, 179 So. 3d at 271-272.

The U.S. Census Bureau released the 2020 Census Redistricting Data for all states, including Florida, and the Legislature commenced the redistricting process in September 2021. The Senate ultimately approved, by a vote of 31 to 4, a congressional redistricting plan that retained District 5's east-to-west configuration.[1] The House's most recent map, released in December 2021, also retains the east-to-west configuration of District 5.[2]

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Despite having no constitutional power to draw Florida's

[1] *See* CS/SB 102: Bill Analysis and Fiscal Impact Statement at 13, Fla. Senate (Jan. 14, 2022), https://www.flsenate.gov/Session/Bill/2022/102/Analyses/2022s00102.re.PDF.

[2] *See* Meeting Packet at 7, Fla. House Redistricting Comm., Cong. Redistricting Subcomm. (Dec. 2, 2021), https://tinyurl.com/2p8xmyhp.

congressional districts, the Governor released his own plan on January 16, 2022.[3] In contrast to the Legislature's plans, the Governor's plan does not include a district resembling the current District 5. The Governor also threatened to veto the Senate's congressional map, describing District 5 as "an unconstitutional gerrymander," despite *Apportionment VII.*[4] The Governor now requests this Court's advisory opinion.

SUMMARY OF ARGUMENT

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This Court should decline to provide an advisory opinion. First, the Court's authority to issue them is limited by Art. IV, § 1(c) of the Florida Constitution, which authorizes advisory opinions only "as to the interpretation of any portion of this constitution upon any question affecting the governor's executive powers and duties." This Court long ago rejected the contention advanced here that the Governor's veto power justifies an advisory opinion on the constitutionality of pending legislation. *See In re Exec. Commc'n,* 6 So.

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[3] *See* Map of P000C0079, Florida Redistricting, https://tinyurl.com/y5j8m2rb.

[4] Jacob Ogles, Gov. DeSantis Hints at Potential Veto of Senate's Congressional Map, Florida Politics (Jan. 21, 2022), https://floridapolitics.com/archives/488699-gov-desantis-hints-at-potential-veto-of-senates-congressional-map/.

at 925. The Governor provides this Court with no reason to depart from this long-standing rule. Authorizing advisory opinions based on veto power would eviscerate the clear limitation in Art. IV, § 1(c), as the Governor could use the pretext of a veto to demand advisory opinions for *any* pending legislation.

Second, while the Governor asks the Court to interpret the Constitution's non-retrogression standard, that standard has no effect on the Governor's powers because he has no role to play in drawing Florida's congressional districts. The Governor's request is therefore impermissible under Art. IV, § 1(c).

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And even if that were not so, this Court has already answered in *Apportionment VII* and *VIII* the Governor's questions about the scope of the non-diminishment standard. The Governor provides no justification for the Court to revisit those controlling decisions in a non-precedential advisory opinion. *Apportionment VII* also answers the Governor's question concerning whether the non-retrogression standard "requires that congressional districts be drawn…from distant and distinct geographic areas." Gov's Req. at 5. As posed by the Governor, this question is unmoored to any facts and is so broad as to not permit a reasoned answer. In *Apportionment VII*, however,

the Court addressed the permissible configuration of a district in the specific context of District 5, ruling that the boundaries and composition of the district comply fully with the non-retrogression requirement.

Moreover, the Court lacks the factual record needed to answer the Governor's inquiry. Questions concerning whether a voting district complies with Florida's non-retrogression requirement are intensely factual, requiring expert testimony and detailed analysis comparing the ability of minority voters to elect their preferred candidates under a benchmark map versus a new map. But, here, the Governor asks this Court to address non-retrogression for District 5 without any factual record whatsoever, let alone providing the Court with an enacted map and the accompanying data needed to measure diminishment in ability to elect. At present, it is simply not possible for the Court to answer the Governor's question based on anything other than conjecture. This is demonstrated by the history underlying the Legislature's creation of current District 5.

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This Court has repeatedly declined to resolve constitutional issues such as this in an advisory opinion, explaining that answering these questions "can best be accomplished in adversary proceedings

appropriately briefed and buttressed by argument of counsel." *In re Advisory Op. to the Governor*, 113 So. 2d 703, 705 (Fla. 1959). The Court should allow the Legislature to fulfill its constitutionally prescribed role in apportioning Florida's congressional districts and then hear any challenges to those enacted districts after development of a factual record, as it has always done.

ARGUMENT

I. THE REQUEST FOR AN ADVISORY OPINION IS IMPROPER.

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Before rendering an advisory opinion, "it is incumbent upon the justices, first, to determine whether [the Governor's] request is within the purview of Article IV, § 1(c)." *In re Advisory Op. to the Governor*, 388 So. 2d 554, 555 (Fla. 1980). A request is within that purview only if it seeks an opinion "as to the interpretation of any portion of this constitution upon any question affecting the governor's executive powers and duties." Art. IV, § 1(c), Fla. Const. If the request falls outside this language, this Court is "without authority to render" an advisory opinion and must decline the request. *In re Advisory Op.*, 388 So. 2d at 555.

Here, the Governor seeks an interpretation of the non-retrogression standard, which provides that "[i]n establishing

congressional district boundaries," districts that "diminish [racial minorities'] ability to elect representatives of their choice" shall not be drawn. Art. III, § 20(a), Fla. Const. Specifically, the Governor seeks an opinion on whether the non-retrogression standard requires retaining District 5 in its east-to-west or north-to-south configuration, and whether it applies to minorities from purportedly "distant and distinct geographic areas." Gov's Req. at 2, 5.

This request plainly falls outside the purview of Art. IV, § 1(c) because the non-retrogression standard governs the drawing of districts, which is the function of the Legislature, not the Governor. The non-retrogression standard "address[es] a single function of a single branch of government—establishing additional guidelines for the *Legislature* to apply when it redistricts . . . congressional boundaries." *Advisory Op. to Atty. Gen.*, 2 So. 3d 175, 181 (Fla. 2009) (emphasis added). And it does so "by forbidding the Florida *Legislature* from drawing a redistricting plan or an individual district" with the intent or effect of diminishing the equal opportunity of racial minorities to elect representatives of their choice. *Apportionment VII*, 172 So. 3d at 369 (emphasis added) (citing Art. III, § 20(a), Fla. Const.). To be sure, the Governor has veto power over districting

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plans passed by the Legislature, but that is different from the power to *draw* districts, which rests alone with the Legislature.

The Governor asserts that the questions he poses affect his veto power, since he "must decide whether to approve or veto" the Legislature's redistricting plan. Gov's Req. at 2. But this Court long ago rejected the contention that the Governor's veto power is sufficient to sustain a request for an advisory opinion on the constitutionality of pending legislation. *See In re Exec. Commc'n,* 6 So. at 925 . There, the Governor requested an advisory opinion providing an interpretation "as to what character of bills, if any, the legislature, at its present session, is . . . denied the power to pass" by a particular provision of the Florida Constitution, "and, which, when submitted to me, it will be my duty, for that reason, to disapprove." *Id.* This Court held that "compliance . . . with [the] request [was] unauthorized by the constitution" because the question did not affect an executive duty:

> Any duty imposed by the constitution on the governor with reference to a bill, before it becomes a law, is not an executive duty. The enactment of laws is a legislative duty, and, when your excellency is required by the constitution to do any act which is an essential prerequisite thereto, such act is legislative, and is performed as part of the lawmaking power, and not as the law-executing power.

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Id.; *see also In re Advisory Op. to the Governor*, 81 So. 2d 782, 785-86 (Fla. 1955) (reaffirming this "pertinent holding" of *In re Exec. Commc'n*).

Unable to distinguish *In re Exec. Commc'n*, the Governor insists that the Court is not bound to follow it. Gov's Req. at 3. But this Court has "previously made clear that although [its] advisory opinions are not strictly binding precedent in the most technical sense, only under *extraordinary* circumstances will [it] revisit an issue decided in [its] earlier advisory opinions." *Ray v. Mortham*, 742 So. 2d 1276, 1285 (Fla. 1999) (emphasis in original); *see also In re Advisory Op. to the Governor*, 509 So. 2d 292, 310 (Fla. 1987) ("Even assuming we could so recede from precedent in an advisory opinion, no such action would be warranted."). The Governor has identified no "extraordinary circumstances" that justify departing from *In re Exec. Commc'n*. On the contrary, the Court's rationale in that case remains sensible: Far from being "quite broad" as the Governor asserts, *see* Gov's Req. at 2, this Court has explained that its advisory powers are "confined" and "restrict[ed]" by the text of Art. IV, § 1(c). *See In re Op. of Supreme Court*, 22 So. 681, 681 (Fla. 1897); *In re Exec. Commc'n*, 6 So. at 925. The Governor's contention that this Court can render an advisory

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opinion on any constitutional issue in pending legislation—regardless of whether the issue relates to the Governor's executive powers or duties—would eviscerate the limitations in the constitutional text.

The Governor also asserts his request is based on his obligation to "take care that the laws be faithfully executed," Art. IV, § 1(a), Fla. Const., since he must enforce the congressional bill after it is enacted. *See* Gov's Req. at 2. But the congressional bill has not been enacted, and, accordingly, any question relating to its constitutionality has no effect on the Governor's executive powers or duties. *See In re Exec. Commc'n*, 6 So. at 925 ("[Executive duty] means a duty appertaining to the execution of the laws as they exist. It would follow that the law must be enacted according to all the terms prescribed by the constitution, before the duty of executing it can exist."); *see also Advisory Op. to the Governor*, 55 So. 460 (Fla. 1911) (same). This Court should reject the Governor's invitation to expand its advisory powers to address pieces of pending legislation.[5]

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[5] To the extent the Governor is arguing that the request relates to his powers to enforce the congressional plan used in the 2020 election, that argument fails because this plan will not be enforced in any further elections given the Legislature's obligation to redraw the districts following the 2020 decennial census.

II. THE COURT SHOULD DECLINE TO RENDER AN ADVISORY OPINION.

The Court should decline to render an advisory opinion even if the request is within the purview of Art. IV, § 1(c). At the threshold, this Court has already addressed the scope of the non-diminishment standard in *Apportionment VII* and *VIII*, and the Governor provides no justification for the Court to revisit those controlling decisions at this time and in this non-precedential advisory opinion. Moreover, the Court "has many times declined to pass upon [certain constitutional questions] in rendering advisory opinions, particularly where [resolution] can best be accomplished in adversary proceedings appropriately briefed and buttressed by argument of counsel." *In re Advisory Op.* , 509 So. 2d at 301 (quoting *In re Advisory Op.*, 113 So. 2d at 705 (collecting cases)). The Legislature's congressional redistricting plans have been rigorously scrutinized in adversary proceedings for decades. *See DeGrandy v. Wetherell*, 794 F. Supp. 1076 (N.D. Fla. 1992) (challenge to congressional plan during 1990 redistricting cycle); *Brown v. Butterworth*, 831 So. 2d 683, 685 (Fla. 4th DCA 2002) (challenge to congressional plan during 2000 redistricting cycle); *Apportionment VII*, 172 So. 3d at 402 (challenge

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to congressional plan during 2010 redistricting cycle). There is no reason to doubt that this redistricting cycle will be any different and, accordingly, there is no reason for this Court to render an advisory opinion at this early juncture.

The Court also lacks the factual record needed to answer the questions raised: whether the non-retrogression standard protects racial minorities from purportedly "distant and distinct geographic areas," and whether the non-retrogression standard in Art. III, § 20(a) mandates the retention of some version of District 5 in the new congressional plan. *See* Gov's Req. at 2, 5. That standard prohibits the Legislature from drawing new congressional districts that "diminish [racial minorities'] ability to elect representatives of their choice." *See* Art. III, § 20(a), Fla. Const. It accordingly calls for a comparative analysis: "The existing plan of a covered jurisdiction serves as the 'benchmark' against which the 'effect' of voting change is measured." *In re Senate Joint Resol. of Leg. Apportionment 1176*, 83 So. 3d 597, 624 (Fla. 2012). But although the Governor asks the Court to opine on whether a congressional plan without District 5 would violate the non-retrogression standard, he has not provided such a plan to the Court—let alone the statistical evidence and expert

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analysis needed to measure diminishment in ability to elect. *See Apportionment VIII*, 179 So. 3d at 286 & nn. 10-11 (explaining the non-retrogression standard requires a functional analysis of statistical evidence, including the voting age of minority populations and election results).

The Governor's request is also plainly at odds with the separation of powers. Reapportionment is a legislative function, and pursuant to that power, the Legislature has undertaken a process to draft and revise new congressional maps. The Governor's request for an advisory opinion at the 11th hour—after the Senate has already passed a congressional plan—is an ill-conceived attempt to hijack the process by asking this Court to make decisions about congressional district lines before the Legislature has even enacted a plan. The Court should reject this improper attempt to intrude on the legislative process and to disregard the vital separation of powers principles established in the Florida Constitution.

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CONCLUSION

For the foregoing reasons, the Court should decline to provide an opinion in response to the Governor's request.

Respectfully submitted this 7th day of February, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 7, 2022 a true and correct copy of the foregoing was filed using the State of Florida ePortal Filing System which will serve a copy on all counsel who have registered to receive notifications.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Bookman Old Style 14- point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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